

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re)
GOHAR ASLANYAN,) Case No. 17-24195-A-7
) Docket Control Nos. SS-2 &
) JWC-1
Debtor.) Date: December 18, 2017
) Time: 3:00 PM
)

MEMORANDUM

The chapter 7 debtor, Gohar Aslanyan, moves to avoid a judicial lien held by Transport Funding, L.L.C., ("Transport") pursuant to 11 U.S.C. § 522(f)(1)(A). That judicial lien secures a claim of approximately \$39,963.48.

The judicial lien held by Transport is based on a writ of attachment recorded more than 90 days¹ before the bankruptcy case was filed. That judicial lien encumbers the debtor's home on Hackberry Lane in Carmichael, California.

The debtor's home is encumbered by an unavoidable mortgage of \$360,124. The debtor maintains that because her home has a

¹ Had the attachment lien been recorded less than 90 days prior to the bankruptcy, it would have terminated when the debtor filed this case. See Cal. Civ. Pro. Code § 493.030(b). And, because no judgment was entered by the court issuing the writ of attachment before the debtor's bankruptcy case was filed, the continued viability to the judicial lien, even if the debtor's motion is denied, depends on Transport's ability to obtain a judgment within three years. See Cal. Civ. Pro. Code § 488.510(a); In re Southern California Plastics, Inc., 165 F.3d 1243, 1246 (9th Cir. 1999).

1 value of \$460,000, and because she is entitled to a \$100,000
2 homestead exemption, the judicial lien impairs her exemption and
3 it may be avoided pursuant to section 522(f)(1)(A).

4 The only dispute between the parties is the value of the
5 debtor's home. Transport asserts that it has a value of
6 \$495,000, but the debtor maintains that it is worth only
7 \$460,000.

8 If the debtor is correct, application of the formula in 11
9 U.S.C. § 522(f)(2)(A) will result in the avoidance of Transport's
10 lien. If Transport is correct, \$34,876.02 of its lien cannot be
11 avoided; only \$5,087.48 may be avoided.

12 Section 522(f)(2)(A) provides that a judicial lien impairs
13 an exemption to the extent the sum of the judicial lien, the
14 unavoidable lien, and the debtor's exemption amount exceeds the
15 value of the property.

16	JUDICIAL LIEN	\$ 39,963.48
17	UNAVOIDABLE LIEN	\$360,124.00
18	EXEMPTION	<u>\$100,000.00</u>
19	TOTAL	\$500,087.48

20 Because \$500,087.48 exceeds the debtor's valuation of
21 \$460,000 by \$40,087.48, the entire judicial lien of \$39,963.48 is
22 avoidable if the debtor is correct about the value.

23 However, at Transport's valuation of \$495,000, only
24 \$5,087.48 impairs the debtor's exemption. A portion of the
25 judicial lien, \$34,876.02, will not be avoided if Transport is
26 correct about the home's value.

27 On the issue of value, which was the only material disputed
28 fact, the court received the testimony of the debtor's real

1 estate broker, Lisa McKee, and Transport's appraiser, Benjamin
2 Voros.

3 The court concludes that the home has a market value of
4 \$479,000. The court hastens to add that, even though \$479,000 is
5 almost midpoint between Ms. McKee's opinion of \$460,000 and Mr.
6 Voros' valuation of \$495,000, the court has not averaged their
7 valuations nor has it otherwise combined them to arrive at a
8 compromise value.

9 Ms. McKee not only testified as to her opinion of the home's
10 value, but she is listing it for sale on behalf of the debtor.²
11 Since the home was listed on November 20, 2017, the debtor
12 rejected an offer of \$450,000, accepted an offer of \$460,000
13 (that the prospective buyer is no longer willing to perform
14 because of delays caused by the bankruptcy), and received an
15 offer of \$479,000. The latter offer was made on Saturday,
16 December 16.³

17 The \$479,000 value arrived at by the court is based on the
18 latest offer received by the debtor.

19 Several arguments militate against basing the value on this
20 latest offer. The court rejects these arguments.

21 First, a debtor's exemption and right to avoid a judicial
22 lien are determined as of the petition date. See In re Chiu,

24 ² Because the court ordered the chapter 7 trustee to
25 abandon the home as property of the estate, the bankruptcy is not
an impediment to a sale by the debtor. See 11 U.S.C. § 554(b).

26 ³ Ms. McKee indicated that this offer has not yet been
27 accepted by the debtor. She wishes to know the court's decision
28 regarding the value of her home and the disposition of her lien
avoidance motion before accepting the offer.

1 266 B.R. 743, 751 (B.A.P. 9th Cir. 2001) (citing In re Dodge, 138
2 B.R. 602, 607 (Bankr. E.D. Cal. 1992)); see also In re Kim, 257
3 B.R. 680, 685 (B.A.P. 9th Cir. 2000). This means that the value
4 of the subject property and the amount of the unavoidable
5 encumbrances are determined as of the petition date and not as of
6 the date the lien avoidance motion is filed or adjudicated.

7 The \$479,000 offer was made almost six months after the case
8 was filed on June 26, 2017. Nonetheless, both Ms. McKee and Mr.
9 Voros testified that today's market conditions have not changed
10 appreciably since June 2017.

11 Second, Ms. McKee suggested that because the \$479,000 offer
12 requires the debtor to pay some of the buyer's closing costs, the
13 net value of the offer to the debtor is closer to \$469,000.

14 When the bankruptcy court determines a debtor's exemption
15 rights in property, 11 U.S.C. § 522(a)(2) directs it to value
16 property at "market value as of the date of the filing of the
17 petition. . . ." There is no provision in section 522(a)(2) or
18 in the statutory formula in section 522(f)(2)(A) mandating that a
19 debtor's likely costs of sale be taken into account when
20 ascertaining market value.

21 Liquidation costs or closing costs are not deducted from
22 market value in the context of a motion to avoid a judicial lien.
23 See, e.g., In re Wolmer, 494 B.R. 783, 784 (Bankr. D. Conn.
24 2013); In re Barrett, 370 B.R. 1, 3 (Bankr. D. Me. 2007) ("[A]
25 bevy of courts have opted against including hypothetical sales
26 costs and other transaction costs in the valuation of collateral
27 for the purpose of determining the fate of a judicial lien."); In re
28 Sheth, 225 B.R. 913, 918-19 (Bankr. N.D. Ill. 1998); In re

1 Sumerell, 194 B.R. 818, 827 (Bankr. E.D. Tenn. 1996); In re
2 Abrahamzadeh, 162 B.R. 676, 678 (Bankr. N.J. 1994); In re Yackel,
3 114 B.R. 349, 351 (Bankr. N.D. N.Y. 1990).

4 Therefore, whatever the transactional costs of a sale may
5 be, and regardless of whether they are borne by the seller or the
6 buyer, the market value of the property does not fluctuate
7 because of those costs.

8 Third, Transport argues that the value urged by the debtor
9 is unreliable because it is based on a sale that allegedly is
10 intended to satisfy only the mortgage and her \$100,000 exemption.
11 The debtor has no incentive to seek more from a sale because it
12 will go toward satisfying Transport's lien.

13 Certainly this is a reason for caution and the court has
14 considered the possibility that the debtor and Ms. McKee are
15 calculating only what is necessary for the debtor to receive her
16 exemption when offering their opinion of value and marketing the
17 property for sale.

18 However, the court doubts that this possibility is a reality
19 largely because the property has been marketed for nearly three
20 months and the offers entertained by the debtor have risen from
21 \$450,000 to \$460,000 to \$479,000. Were the debtor intent on only
22 insuring her exemption she would not have presented the \$479,000
23 offer to the court.

24 Also, if the debtor's only goal were to preserve her
25 exemption, it was unnecessary for the debtor to sell the
26 property. This could have been accomplished without hiring a
27 real estate broker or hiring an attorney to prosecute a lien
28 avoidance motion. Instead, the debtor could have allowed

1 Transport to execute upon its judicial lien. In connection with
2 any execution sale, the debtor is guaranteed payment of her
3 exemption. See Cal. Civ. Pro. Code § 704.800(a) (providing that
4 homesteaded property may not be sold by a judgment creditor
5 unless a bid is received that is sufficient to pay senior
6 encumbrances and the judgment debtor's homestead exemption).

7 Fourth, the court does not find the appraisal of Mr. Voros
8 to be convincing.

9 As noted by Ms. McKee, the debtor's home is unique, but not
10 in a good way. It does not border a public street. It is
11 sandwiched between a church and another home. To its left and
12 right are two other homes. The debtor's home is not visible from
13 the street and to access it, one must travel on a driveway
14 located on the property that obscures the front of the debtor's
15 home. The debtor's front yard is a small blacktop used for
16 parking.

17 The debtor's home is not located within a cohesive
18 neighborhood. There are wide variations in lot sizes, there are
19 no sidewalks in the vicinity of the debtor's home or those around
20 it, single family residences line one side of Hackberry Lane but
21 the opposite side consists of duplexes, a church and its parking
22 lot abut the back of the debtor's home, and the aerial photo in
23 Mr. Voros' appraisal shows significant acreage near the debtor's
24 home that either is undeveloped or not landscaped.

25 Comparison of the debtor's home to the three comparable
26 sales used in Mr. Voros' appraisal is revealing. They are
27 located .84 to 1.89 miles away from the debtor's home in
28 different neighborhoods. The photos of each indicates they are

1 located in well-maintained and landscaped single family
2 residential neighborhoods comprised of homes of similar quality,
3 construction, and age. This is unlike the debtor's neighborhood.

4 It was suggested by Mr. Voros that 7138 Willey Way in
5 Carmichael was a particularly relevant comparable sale because
6 this property was accessed by a driveway used by two homes.
7 However, this property fronts on Willey Way; it is not behind or
8 surrounded by structures as is the debtor's home.

9 In short, while the comparable sales referenced in the
10 appraisal are similar to the debtor's home in terms of quality of
11 home construction, age, size, and amenities, they are not
12 situated in comparable neighborhoods. The debtor's home suffers
13 in this regard. Yet, the court sees no adjustment in the
14 appraisal that accounts for this difference.

15 When this difference is considered, the court believes a
16 value of less than \$495,000 is likely. The court concludes that
17 the home had a fair market value of \$479,000 when this case was
18 filed.

19 As noted above, the judicial lien, the unavoidable lien, and
20 the debtor's exemption total \$500,087.48. With a property value
21 of \$479,000, \$21,087.48 of the judicial lien impairs the debtor's
22 exemption and may be avoided. But, \$18,876 of Transport's lien
23 remains on the debtor's home because it does not impair her
24 exemption. See 11 U.S.C. § 522(f)(2)(A).

25 Also before the court is Transport's motion for relief from
26 the automatic stay. It seeks leave to return to state court in
27 order to obtain the entry of a judgment in its suit against the

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1 debtor.⁴ It seeks to do this, not to establish and enforce a
2 personal liability of the debtor, but to “perfect” its attachment
3 lien. See First Fed. Bank of Calif. v. Robbins (In re Robbins),
4 310 B.R. 626, 630 n. 4 (B.A.P. 9th Cir. 2004).

5 The motion will be dismissed because it is moot. As noted
6 above, the court has compelled the trustee to abandon the
7 debtor’s home. Consequently, the home is no longer property of
8 the estate. Further, the debtor’s discharge was entered on
9 December 5.

10 Given that the bankruptcy estate no longer has an interest
11 in the debtor’s home, and given the entry of the debtor’s
12 discharge, the automatic stay has expired as a matter of law.
13 See 11 U.S.C. § 362(c)(1) & (c)(2). The house and the debtor are
14 no longer protected by the automatic stay. There is nothing for
15 the court to terminate or modify.


16 This is not to say that the court agrees (or disagrees) that
17 Transport is free to start where it left off in state court in
18 order to perfect its judgment lien. See Diamant v. Kasparian (In
19 re Southern California Plastics Inc.), 165 F.3d 1243 (9th Cir.
20 1999); Sciarrino v. Mendoza, 201 B.R. 541, 544-45 (E.D. Cal.
21 1996). Cf. Montano Cigarette Candy & Tobacco Inc. (In re
22 Shivani), 2004 WL 484549, at *3-4 (Bankr. D. Conn. March 11,
23 2004); FDIC v. Debtor & Trustee (In re Moscoso Villaronga), 111
24 B.R. 13, 17-18 (Bankr. D.P.R. 1989). That is an issue for
25 another day in, perhaps, another court.

26
27 ⁴ Entry of a judgment may be perfunctory. Before the
28 bankruptcy case was filed, Transport’s motion for summary
judgment was granted.

1 The attorney for the debtor shall lodge conforming orders on
2 both motions.

3 Dated: December 20, 2017

By the Court

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5 
6 Michael S. McManus
United States Bankruptcy Judge

**Instructions to Clerk of Court
Service List – Not Part of Order/Judgment**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC.

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